

1
2 UNITED STATES DISTRICT COURT
3 WESTERN DISTRICT OF WASHINGTON
4 AT TACOMA

5 KARI ANN MOON,

6 Plaintiff,

7 v.

8 CAROLYN W. COLVIN, Acting
9 Commissioner of Social Security,

10 Defendant.

11 CASE NO. C14-5647 BHS

12 ORDER REVERSING AND
13 REMANDING

14 **I. BASIC DATA**

15 Type of Benefits Sought:

16 Disability Insurance

17 Supplemental Security Income

18 Plaintiff's:

19 Sex: Female

20 Age: 36 on date application filed

21 Principal Disabilities Alleged by Plaintiff: Fibromyalgia, degenerative disc disease, wrist
22 impairment, hypothyroidism, bipolar disorder, post-traumatic stress disorder, and anxiety
disorder.

23 Disability Allegedly Began: July 22, 2009

24 Principal Previous Work Experience: Unskilled

25 Education Level Achieved by Plaintiff: At least high school

1 **II. PROCEDURAL HISTORY—ADMINISTRATIVE**

2 Before ALJ Verrell Dethloff:

3 Date of Hearing: June 5, 2013, hearing transcript AR 48–82

4 Date of Decision: July 5, 3013

5 Appears in Record at: AR 17–41

6 Summary of Decision:

7 Claimant has not engaged in substantial gainful activity since her
8 alleged onset date. She has severe impairments of fibromyalgia,
9 thyroid disorder, degenerative disc disease of the cervical spine,
10 status post fusion, affective disorder, anxiety disorder, personality
11 disorder, and somatoform disorder. Her impairments, even in
12 combination, do not qualify under the Listings.

13 Claimant has the residual functioning capacity to perform light
14 work. She can sit, stand, and/or walk for six hours in an eight hour
15 workday in any combination. She can lift and/or carry twenty
16 pounds frequently and ten pounds occasionally. She can
17 occasionally climb ladders. She is limited in left overhead reaching
18 to frequent and is limited in handling with the right dominant hand
19 to frequent. She is also limited to simple and detailed tasks with
20 superficial interaction with the public and coworkers.

21 Claimant cannot perform any of her past relevant work. The
22 vocational expert testified that claimant can perform the following
23 jobs: assembler, sorter, addresser, and surveillance system monitor.
24 Based on the vocational expert's testimony, claimant can perform
25 substantial work that exists in the national economy. A finding of
26 “not disabled” is therefore appropriate.

27 Before Appeals Council:

28 Date of Decision: June 20, 2014

29 Appears in Record at: AR 1–5

30 Summary of Decision: Declined review

1 **III. PROCEDURAL HISTORY—THIS COURT**

2 Jurisdiction based upon: 42 U.S.C. § 405(g)

3 Brief on Merits Submitted by (X) Plaintiff (X) Commissioner

4 **IV. STANDARD OF REVIEW**

5 Pursuant to 42 U.S.C. § 405(g), the Court may set aside the Commissioner's
6 denial of Social Security benefits when the ALJ's findings are based on legal error or not
7 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
8 1211, 1214 n.1 (9th Cir. 2005). "Substantial evidence" is more than a scintilla, less than
9 a preponderance, and is such relevant evidence as a reasonable mind might accept as
10 adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971);
11 *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for
12 determining credibility, resolving conflicts in medical testimony, and resolving any other
13 ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).

14 While the Court is required to examine the record as a whole, it may neither reweigh the
15 evidence nor substitute its judgment for that of the ALJ. See *Thomas v. Barnhart*, 278
16 F.3d 947, 954 (9th Cir. 2002). "Where the evidence is susceptible to more than one
17 rational interpretation, one of which supports the ALJ's decision, the ALJ's conclusion
18 must be upheld." *Id.*

19 **V. EVALUATING DISABILITY**

20 The claimant, Kari Moon ("Moon"), bears the burden of proving she is disabled
21 within the meaning of the Social Security Act ("Act"). *Meanel v. Apfel*, 172 F.3d 1111,
22 1113 (9th Cir. 1999). The Act defines disability as the "inability to engage in any

1 “substantial gainful activity” due to a physical or mental impairment which has lasted, or
2 is expected to last, for a continuous period of not less than twelve months. 42 U.S.C.
3 §§ 423(d)(1)(A), 1382c(3)(A). A claimant is disabled under the Act only if her
4 impairments are of such severity that she is unable to do her previous work, and cannot,
5 considering her age, education, and work experience, engage in any other substantial
6 gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also*
7 *Tackett v. Apfel*, 180 F.3d 1094, 1098–99 (9th Cir. 1999).

8 The Commissioner has established a five-step sequential evaluation process for
9 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R.
10 §§ 404.1520, 416.920. The claimant bears the burden of proof during steps one through
11 four. *Valentine v. Comm’r of Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009). At
12 step five, the burden shifts to the Commissioner. *Id.*

13 VI. ISSUES ON APPEAL

- 14 1. Did the ALJ err in assessing medical evidence?
15 2. Did the ALJ err in assessing lay witness testimony?

16 VII. DISCUSSION

17 A. Dr. Cline’s Opinion

18 Moon argues that the ALJ did not provide specific and legitimate reasons for
19 rejecting Dr. Cline’s opinion. Dkt. 13 at 4.

20 “A treating physician’s opinion is entitled to ‘substantial weight.’” *Bray v.*
21 *Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009). When the evidence in
22 the record contradicts the treating physician’s opinion, the ALJ must give “specific and

1 legitimate reasons supported by substantial evidence in the record” for discounting the
2 opinion. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995) (internal quotation marks
3 omitted). “The ALJ can meet this burden by setting out a detailed and thorough summary
4 of the facts and conflicting clinical evidence, stating his interpretation thereof, and
5 making findings.” *Cotton v. Bowen*, 799 F.2d 1403, 1408 (9th Cir. 1986).

6 In August 2011, Dr. Cline examined Moon and diagnosed her with a mood
7 disorder, an anxiety disorder, and a possible borderline personality disorder. AR 390.
8 Dr. Cline found that Moon would have moderate problems performing tasks even with
9 simple instructions. *Id.* Dr. Cline also determined that Moon would have moderate
10 difficulty communicating and performing effectively in a work setting even with limited
11 public contact. AR 391.

12 The ALJ gave little weight to Dr. Cline’s opinion regarding Moon’s cognitive and
13 social limitations. AR 34. The ALJ found that Dr. Cline “largely based her opinions on
14 [Moon’s] self-reports without the benefit of reviewing all of her medical records
15 available at the time, which would have showed improved mental health symptoms with
16 medication.” *Id.*

17 The ALJ did not provide specific and legitimate reasons for rejecting Dr. Cline’s
18 opinion. First, Dr. Cline did not indicate that her opinions were based on Moon’s self-
19 reports. Instead, Dr. Cline supported her opinions with objective findings and her own
20 observations. For example, Dr. Cline noted that Moon could not complete serial
21 subtractions without errors and had difficulties with digit span. AR 390. Dr. Cline
22 observed that Moon’s answers to questions were delayed. *Id.* Dr. Cline also noted that

1 Moon was “very difficult to focus and keep on topic during the interview.” AR 391.

2 Finally, Dr. Cline conducted a Rey test to ensure that Moon was not malingering. *Id.*

3 Thus, the ALJ’s first reason for rejecting Dr. Cline’s opinion is insufficient.

4 The ALJ’s second reason for rejecting Dr. Cline’s opinion is also insufficient.

5 Although the ALJ indicated that Moon’s medical records showed improvement, the ALJ

6 relied on records six months prior to Dr. Cline’s examination in August 2011. AR 34

7 (citing AR 401). Medical evaluations from July 2011 and December 2011 discuss

8 limitations similar to those that Dr. Cline found. *Compare* AR 397, 518, 522, with AR

9 390–91. The Court therefore concludes that the ALJ erred when he rejected Dr. Cline’s

10 opinion regarding Moon’s cognitive and social limitations.

11 **B. Dr. Neims’s Opinion**

12 Next, Moon argues that the ALJ did not provide specific and legitimate reasons for
13 rejecting Dr. Neims’s opinion. Dkt. 13 at 9.

14 In December 2011, Dr. Neims examined Moon and diagnosed her with chronic
15 PTSD, anxiety disorder, pain disorder, and borderline personality disorder. AR 514. Dr.
16 Neims found that Moon would have moderate limitations communicating and performing
17 effectively in a normal work setting. AR 515. Dr. Neims also noted that Moon would
18 have marked limitations maintaining appropriate behavior in a work setting. *Id.*

19 The ALJ provided a number of reasons for rejecting Dr. Neims’s opinion. AR 33–
20 34. First, the ALJ found that “the severity of [Moon’s] cognitive limitations is
21 inconsistent with a number of mental status exams and her ability to attend college
22 online.” AR 33. This reason is neither legitimate nor supported by substantial evidence

1 in the record. As a preliminary matter, Dr. Neims's opinion regarding Moon's cognitive
2 limitations is consistent with Dr. Cline's opinion and medical testing. Additionally, Dr.
3 Neims examined Moon in December 2011. Moon, however, withdrew from college in
4 early 2011 and did not return. AR 458. Evidence in the record indicates that Moon
5 experienced confusion, tangentiality, and other similar problems after she stopped
6 attending school. AR 391, 397, 733, 741, 742, 743.

7 Next, the ALJ noted that Dr. Neims "described the claimant as friendly and
8 cooperative, [which is] inconsistent with marked limitations in social functioning." AR
9 33. This reason is not legitimate in light of the evidence in the record. Dr. Neims made
10 several other observations about Moon's functioning in his report. For example, Dr.
11 Neims noted that Moon was rambling, required frequent redirection, and was somewhat
12 disorganized. AR 518. These observations support Dr. Neims's opinion regarding
13 Moon's social functioning.

14 The ALJ also stated that Dr. Neims "had no records to review to obtain an
15 accurate longitudinal record of her functioning and relied in large part on [Moon's] self-
16 reported symptoms while [Moon] is not entirely credible." AR 34. This reason is neither
17 legitimate nor supported by substantial evidence. Dr. Neims's report indicates that he
18 relied on a mental status examination and observations of Moon to reach his conclusions.
19 See AR 515, 518, 526–28. In the mental status exam, Dr. Neims noted abnormalities in
20 Moon's motor activity, speech, affect, memory, and thought processes. AR 522–24.
21 These findings support Dr. Neims's conclusions regarding Moon's cognitive and social
22 limitations.

1 Finally, the ALJ found that Dr. Neims “failed to sufficiently consider whether
2 [Moon] was exaggerating . . .” AR 34. Dr. Neims, however, considered whether Moon
3 was exaggerating when he noted that malingering was not suspected. AR 519.

4 For these reasons, the Court finds that the ALJ erred when he rejected Dr. Neims’s
5 opinion.

6 **C. Dr. Covell’s Opinion**

7 Moon also contends that the ALJ erred when he did not include all of the
8 limitations assessed by Dr. Covell, a reviewing medical consultant, in the hypothetical
9 question to the vocational expert. Dkt. 13 at 11.

10 “Hypothetical questions posed to the vocational expert must set out *all* the
11 limitations and restrictions of the particular claimant . . .” *Embrey v. Bowen*, 849 F.2d
12 418, 422 (9th Cir. 1988). “If a vocational expert’s hypothetical does not reflect all of the
13 claimant’s limitations, then the expert’s testimony has no evidentiary value to support a
14 finding that the claimant can perform jobs in the national economy.” *Matthews v.*
15 *Shalala*, 10 F.3d 678, 680 (9th Cir. 1993) (internal quotation marks omitted).

16 In April 2012, Dr. Covell completed a mental residual functional capacity
17 assessment of Moon. Dr. Covell concluded that Moon was capable of superficial
18 interactions with the public and a few co-workers. Although the ALJ stated that he gave
19 significant weight to Dr. Covell’s opinion, the ALJ did not adopt Dr. Covell’s opinion
20 that Moon could interact with only a few coworkers. AR 35, 76, 112. The ALJ did not
21 explain why he failed to include this limitation in the hypothetical question to the
22 vocational expert.

1 The Government concedes that the ALJ erred, but argues that this error was
2 harmless. Dkt. 14 at 7. The Court disagrees. The ALJ did not incorporate Dr. Covell's
3 opinion that Moon was capable of superficial interactions with few co-workers in the
4 hypothetical question. Because the hypothetical question did not include all of Moon's
5 assessed limitations, the vocational expert's testimony cannot support a finding that
6 Moon can perform jobs in the national economy. *See Matthews*, 10 F.3d at 680. The
7 Commissioner therefore failed to meet her burden at step five of the analysis, and this
8 error cannot be deemed harmless.

9 **D. Chris Dague's Testimony**

10 Finally, Moon argues that the ALJ did not provide germane reasons for rejecting
11 statements from her boyfriend and roommate, Chris Dague ("Dague"). Dkt. 13 at 13.

12 Lay witness testimony regarding a claimant's symptoms "is competent evidence
13 that an ALJ must take into account," unless the ALJ "expressly determines to disregard
14 such testimony and gives reasons germane to each witness for doing so." *Lewis v. Apfel*,
15 236 F.3d 503, 511 (9th Cir. 2001). In rejecting lay testimony, the ALJ need not cite to
16 the specific record as long as "arguably germane reasons" for dismissing the testimony
17 are noted and substantial evidence supports the ALJ's decision. *Id.* at 512.

18 In his statement, Dague described Moon as having significant pain with
19 functioning as well as difficulty focusing. AR 266. The ALJ rejected Dague's testimony
20 for the same reasons he found Moon's testimony not credible to establish disability. AR
21 37. The ALJ also rejected Dague's testimony because he "described [Moon] as engaging
22 in multiple chores and working on different tasks." *Id.*

1 The ALJ did not provide germane reasons for rejecting Dague's statements. The
2 ALJ rejected Moon's testimony because she gave a number of inconsistent reports, had
3 not quit smoking, had been charged with shoplifting, was motivated by secondary gain to
4 obtain benefits, and engaged in histrionic and exaggerated behavior at the hearing. AR
5 27–29. These reasons, however, do not apply equally to Dague's testimony.

6 Moreover, Dague's statement about Moon engaging in multiple chores and
7 working on different tasks is consistent with his report that Moon had difficulty focusing
8 and completing tasks. *See* AR 266 ("[Moon] has a hard time staying focused on tasks
9 also. She tries to clean around the house and when she starts one chore, she often gets
10 distracted and starts another without even finishing the first."). The Court therefore
11 concludes that the ALJ erred when he rejected Dague's testimony.

12 **E. Remand**

13 For the foregoing reasons, the Court concludes that the Commissioner's decision
14 should be reversed and remanded for further proceedings. On remand, the ALJ should
15 reevaluate the opinions of Dr. Cline, Dr. Neims, and Dr. Covell. The ALJ should also
16 reevaluate the lay witness testimony of Dague.

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1 **VIII. ORDER**

2 Therefore, it is hereby **ORDERED** that the Commissioner's final decision
3 denying Moon disability benefits is **REVERSED** and the matter is **REMANDED** for
4 further proceedings consistent with this order.

5 Dated this 16th day of March, 2015.

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8 BENJAMIN H. SETTLE
9 United States District Judge

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